Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977.

Nos. 77-25, 77-37, 77-42

FLAGG BROTHERS, INC., Individually and as Representative of a Class of All Others Similarly Situated, HENRY FLAGG, Individually and as President of FLAGG BROTHERS, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, Individually and on Behalf of All Others Similarly Situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1977

NOS. 77-25, 77-37, 77-42

FLAGG BROTHERS, INC., INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, HENRY FLAGG, INDIVIDUALLY AND AS PRESIDENT OF FLAGG BROTHERS, INC., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, AND LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

This brief is submitted on behalf of respondents in opposition to the petitions for a writ of certiorari filed in the related

proceedings, Flagg Brothers, et al. v. Brooks, et al, No. 77-25, Lefkowitz v. Brooks, et al., No. 77-37, and Flagg Brothers, et al. v. Brooks, et al., No. 77-42. All three petitions seek a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in Brooks v. Flagg Brothers, 533 F.2d 764 (2d Cir. 1977) (1a-30a). *

Respondents oppose the petitions for certiorari on the ground that the judgment of the court below is clearly non-final, and remands important questions of procedural due process and the scope of the plaintiff and defendant classes to the district court.

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* References are to the Appendix to the Petition for a Writ of Certiorari in Flagg Brothers, et al. v. Brooks, et al., No. 77-25.

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(1a-2a, 8a, 25a-26a). See Point I, infra.

STATEMENT OF THE CASE

A. The Contested Statute.

Section 7-209 of the New York Uniform Commercial Code grants warehousemen possessory liens on goods in their possession for storage, transportation, insurance and other charges allegedly due. The contested statute, section 7-210 of the New York Uniform Commercial Code, grants warehousemen the power to enforce their liens by selling the goods if the owner does not pay the charges which the warehouseman claims are due.

Section 7-210, however, does not provide the owner of the goods with an opportunity to be heard at any time. It does not require the warehouseman to obtain judicial approval to sell the goods. Mitchell v. W. T. Grant Co., 416 U.S.

600 (1974). Indeed, the statute does not even require the warehouseman ever to bring an action on his claim. Plaintiff contends that section 7-210 authorizes a final and complete taking of a person's property in violation of the most fundamental principles of procedural due process. North Georgia Finishing Co. v. DiChem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., supra; Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Defendants contended in the courts below that the contested statute is constitutional because there is no state action and, that even if there is state action, section 7-210 comports with the requirements of the Due Process Clause.

B. Proceedings Below.

The complaint alleges, inter alia, that section 7-210 of the New York Uniform Commercial Code violates the Due Process

Clause of the Fourteenth Amendment. The resolution of this question involves two issues: (1) whether the enforcement of a warehouseman's lien constitutes state action; and (2) whether the warehouseman's enforcement of the lien by the sale of bailed goods, without affording the bailor-owner of the goods an opportunity to be heard, violates the Due Process Clause.

The district court held that state action was not present and therefore dismissed the action. Brooks v. Flagg Brothers, 404 F.Supp. 1059 (S.D.N.Y. 1975) (31a-47a). Finding no state action, the district court did not determine the due process question or the scope of the plaintiff and defendant classes.

Plaintiffs appealed the judgment dismissing the complaint to the United States Court of Appeals for the Second Circuit. That court determined that state action was present, reversed the district court's

judgment of dismissal and remanded the action to the district court to determine the due process question and the scope of the classes. Brooks v. Flagg Brothers, 553 F.2d 764 (2d Cir. 1977). The state action question was the only question on the merits which was decided by the court below. The court below did not reach the due process question and thus did not determine the constitutionality of the constested statute. Nor did the court below determine the proper scope of the plaintiff and defendant classes. Rather, these important questions were remanded to the district court. (1a-2a, 8a, 25a-26a).

Petitioners thus request this Court to review a non-final judgment and opinion of the Second Circuit Court of Appeals which leave open not only the resolution of an important constitutional question, but also the determination of the classes of

persons to be affected by the outcome of the action. In the present posture of this action, respondents contend that review should not be granted.

ARGUMENT

I

THE PETITIONS FOR CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT AND OPINION OF THE COURT OF APPEALS ARE NON-FINAL AND REMAND IMPORTANT QUESTIONS OF DUE PROCESS AND THE SCOPE OF THE CLASSES TO THE DISTRICT COURT.

Respondents contend that the petitions for certiorari should be denied because the judgment and opinion of the court below are non-final, and remand to the district court important questions of due process and the scope of the plaintiff and defendant classes. These questions should be resolved by the lower courts before this Court determines the state action question decided by the Court of Appeals.

Both Congress and this Court have consistently expressed a strong policy against piecemeal appeals. Switzerland Cheese Association v. E. Horne's Market, 385 U.S. 23, 24 (1966); Baltimore Contractors v. Bodinger, 348 U.S. 176, 178 (1955); Radio Station WOW v. Johnson, 326 U.S. 120, 123 (1945). This policy is embodied in the "dominant rule" in federal appellate practice, the final judgment rule. 9 Moore, Federal Practice, para. 110.06, p. 105, para. 110.08[1], p. 112. The rule against appeals from non-final judgments is not a mere "technical concept", but "an historic characteristic of federal appellate procedure," which "is the means for achieving a healthy legal system." Cobbledick v. United States, 304 U.S. 323, 324-326 (1940).

While there is no statutory requirement of finality when certiorari is sought

to review a judgment of the United States Court of Appeals, 28 U.S.C. section 1254, this Court has consistently recognized that the lack of finality generally dictates that certiorari be denied. Brotherhood Locomotive Firemen v. Bangor & Aroostook RR., 389 U.S. 327, 328 (1967); Hamilton-Brown Shoe Co. v. Wolf Brothers, 240 U.S. 251, 257-258 (1916); Denver v. New York Trust Co., 229 U.S. 123, 133 (1912); The Conqueror, 166 U.S. 110, 113-114 (1897); American Construction Co. v. Jacksonville T. & W. R. Co., 148 U.S. 372, 384 (1893); Stern and Gressman, Supreme Court Practice, section 4.19, p. 180 (4th ed. 1969). In American Construction Co. v. Jacksonville T. &. W. R. Co. supra at 384, this Court stated:

> "Clearly, therefore, this Court should not issue a writ of certiorari to review a decree of the circuit court of

> appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

And, this Court has specifically held that the lack of finality "of itself alone furnishe[s] sufficient ground for the denial of the application [for writ of certiorari]." Hamilton-Brown Shoe Co. v. Wolf Brothers, supra at 258.

Petitioners Flagg Brothers and Flagg refer to "[t]he technical nonfinality of the Court of Appeals judgment...." (Petition for a Writ of Certiorari, Flagg Brothers, et al. v. Brooks, et al., No. 77-25, p. 5). Far from being technically nonfinal, the judgment of the court below remands to the district court a significant question of procedural due process, as well as important questions concerning the scope of the plaintiff and defendant

classes. Following the determination of these questions by the lower courts, review on these questions will undoubtedly be subsequently sought in this Court. In this posture, it is not proper to grant certiorari:

> "Of course, where the remaining litigation may raise other federal questions that may come here,...to allow review of an intermediate adjudication would offend the decisive objections to fragmentary reviews." Radio Station WOW v. Johnson, 326 U.S. 120, 127 (1945). *

This is not a case where the Court of Appeals has determined the constitutionality of a contested statute and only remanded a question of procedure or remedies to the

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* While Radio Station WOW involves an appeal from a state court, the principle is equally applicable when certiorari is sought to review a judgment of the United States Court of Appeals in view of this Court's general policy against piecemeal appeals.

district court. Cf. City of New Orleans v. Dukes, 96 S.Ct. 2513, 2516 (1976). Nor is this a case where the final result is "no more than a few formal gestures...." Mills v. Alabama, 384 U.S. 214, 217 (1966). On the contrary, petitioners have vigorously argued in the courts below that even if state action is present, the contested statute does not violate the Due Process Clause. Compare Hernandez v. European Auto Collision, 487 F.2d 378 (2d Cir. 1973) with Magro v. Lentini Bros. Moving and Storage Co., 338 F.Supp. 464 (E.D. N.Y. 1971), aff'd, 460 F.2d 1064 (2d Cir.), cert. denied, 406 U.S. 961 (1972). This is thus a case where the court below decided only one of the two constitutional questions which must be resolved in order to determine the constitutionality of the contested statute, i.e., the state action question, and remanded the second question,

i.e., the due process question, to the district court.

The instant case is clearly distinguishable from the cases relied upon by petitioners Flagg Brothers and Flagg, Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949); Land v. Dollar, 330 U.S. 731 (1947) and United States v. General Motors Corp., 323 U.S. 373 (1945). (Brief for Petitioners Flagg Brothers and Flagg, No. 77-25, p. 5). In each of these cases, this Court reviewed an interlocutory order of the Court of Appeals because that order presented the only federal question in the case worthy of Supreme Court review. It was wholly improbable that another substantial federal question would arise in the course of subsequent proceedings which would be worthy of review in this Court. In this context, this Court regarded the federal question

presented by the petition for certiorari to review the interlocutory order as "fundamental to the further conduct of the case." United States v. General Motors Corp., supra at 377.

In contrast to the above cited cases, the petitions for certiorari in the present case do not seek review of the only significant federal question. On the contrary, the remand of the Court of Appeals directs the district court to determine an important question of procedural due process.

Petitioners have not set forth any reasons why certiorari should be granted at this time. They have made no attempt to show that review is necessary to prevent "extraordinary inconvenience and embarrassment." American Construction Co. v. Jacksonville T. & W. R. Co., supra at 384. Since the court below did not grant plaintiffs any relief, petitioners are unable to show that

they will suffer irreparable injury or injustice from its decision. Cf. Gillespie v. United States Steel Corp., 379 U.S. 148, 153 (1964); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 584-585 (1952).

In addition, a denial of certiorari by this Court at this time will not deprive petitioners of the opportunity to litigate the state action issue in this Court. The state action issue will be properly before this Court when review is sought from a final judgment of the Court of Appeals. When review is sought from a final judgment, this Court "is called upon to notice and rectify any errors that may have occurred in the interlocutory proceedings." Hamilton-Brown Shoe Co. v. Wolf Brothers, supra at 258-259. Accord, Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 (1973); Toledo Scale Co. v. Computing Scale Co.,

261 U.S. 399, 418 (1923). * Since the court below did not grant any relief against petitioners, and since petitioners will not be precluded from raising the state action issue when review is sought from a final judgment, petitioners are unable to demonstrate that they will be harmed in any way if this Court denies review at this time.

The state action question should not be decided by this Court in a vacum, but only after the lower courts have determined the due process question and the scope of the classes. These issues are at least to some extent interrelated. The court below stated that on remand, "the first question to be resolved is that of class determination,

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* Indeed, should the Court of Appeals subsequently hold the contested state statute unconstitutional, review would be by appeal and within this Court's mandatory jurisdiction. 28 U.S.C. section 1254(2).

because that may have an important bearing on the resolution of due process claims." Brooks v. Flagg Brothers, supra at 774 (25a). This is because the due process question may be decided differently for merchant bailors than for consumer bailors. Brooks v. Flagg Brothers, 533 F.2d supra at 72 (25a). Compare New York Uniform Commercial Code, section 7-210(1) with New York Uniform Commercial Code, section 7-210(2). Compare, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972) with D. H. Overmyer v. Frick Co., 405 U.S. 174 (1972). See Memorandum of Warehousemen's Association of New York, et al. in Support of the Three Petitions for a Writ of Certiorari, p. 4.

The manner in which the lower courts resolve the class action and due process questions may in turn be significant in this Court's ultimate resolution of the state action question. For example, if the lower

courts hold that merchants who store goods are not properly members of the plaintiff class, it will be unnecessary, and indeed improper, for this Court to decide the state action and due process questions with respect to subdivision one of section 7-210 of the New York Uniform Commercial Code.

In addition, an important factor in determining the state action question is whether or not there exists a valid contractual provision which authorizes the warehouseman to sell bailed goods. See, e.g., Bond v. Dentzer, 494 F.2d 302 (2d Cir.), cert. denied, 419 U.S. 837 (1974); Shirley v. State National Bank, 493 F.2d 739 (2d Cir.), cert. denied, 419 U.S. 1009 (1974); Adams v. Southern California First National Bank, 493 F.2d 739 (2d Cir.), cert. denied, 419 U.S. 1006 (1974). Whether such valid contractual authorization exists may depend upon whether the bailor is a merchant or a

consumer. Compare, Fuentes v. Shevin, supra with D. H. Overmyer Co. v. Frick Co., supra. The lower courts should resolve these questions before this Court determines the state action issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

DATED: White Plains, New York
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